REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

APPEAL NO.17 OF 2017

BERNARD NYANCHIENG'A ONYANCHA.....APPELLANT

VERSUS

GILANI'S SUPERMARKET LIMITED.....RESPONDENT

[Being an appeal from the judgement and decree of Hon. J.M. Omido, Principal Magistrate delivered on 27th January, 2017 in Nakuru CMCC No.558 of 2015]

JUDGEMENT

The appeal herein is based on the facts pleaded in the Plaint filed on 20th May, 2015 in Nakuru CMCC No.558 of 2015 that the appellant was an employee of the respondent and while at work on 2nd February, 2015 h was involved in an accident when cooking with oil and burnt his right forearm as a result of which he suffered serious injuries. That the accident was occasioned by the negligence and breach of duty and breach of contract of employment by the respondent by failing to ensure adequate precautions and safety of the appellant and failing to provide a safe work environment. He claimed for general and special damages.

In defence, the respondent denied the claims made and there was no negligence or breach of any statutory duty and where the appellant was injured, if at all, such arose out of his negligence and failure to follow and employ common sense while at work and while engaged in a frolic of his own and his claims have no basis.

The trial court heard the parties and in judgement delivered on 27th January, 2017 analysed the evidence and made findings that the appellant's case had no good basis and therefore dismissed it with costs.

Aggrieved the appellant filed the instant appeal on seven (7) grounds which can be summarised that the trial court erred in law and in fact by dismissing the claim despite proving the same on a balance of probabilities; the trial court wrongly evaluated the evidence and blamed the appellant for the accident and failed to appreciate the legal duty imposed upon the employer and thus only relied on the defence and failed to consider there was injury to the appellant. That three was error in assessment of damages which was too low in disregard of the principles with regard to assessment of damages and the judgement should be set aside, judgement entered at 100%, there be re-assessment of damages and the appellant be awarded costs.

Both parties filed written submissions.

The appellant submitted that the finding by the trial court that the appellant failed to prove his case on a balance of probabilities was erroneous as his evidence was that he was injured while at work due to the negligence of the respondent by failing to provide a safe working environment. The particulars of negligence were outlined. The appellant testified that he was not a trained chef and in allocation of duty to cook with hot oil, this splashed and caused him injury and damage and the respondent should be held liable in negligence and breach of duty.

The appellant also submitted that the Occupational and Safety Health Act places the duty of care upon the employer to ensure the safety of employees at the shop floor. The employer should not expose the employee and should provide facilities to avoid injury or damage.

Section 6(2) (c) of the Occupations Safety and Health Act requires the employer to train the em0loyee and ensure supervisor as is necessary to ensure the safety and health at work of every person employed. Section 74 of the Employment Act requires the employer to maintain work records and where the appellant was trained in his area(s) of work the respondent as the employer ought to have produced such material. There was no proof of issuance of protective gear to the appellant by the respondent.

In the case of **Boniface Muthama Kavita versus Carton Manufacturers Limited [2015] eKLR** the court held that the employer held the duty of care and was required to take all reasonable precautions and provide a safe system of work to avoid injury to the employee. The appellant was not given any supervision while cooking kebabs and which led him to having an accident and injury. In the case of **Nickson Muthoka Mutavi versus Kenya Agriculture Research Institute [2016] eKLR** the court held that the employer should have given advice, instructions of orders about the hazards that the electricity lines posed and were likely to cause injury. The employer hence has a duty to ensure the safety of its employees while on duty.

The appellant also submitted that the assessment of damages by the trial court at Ksh.60, 000 was too low weighed against similar cases and this ought to be re-assessed and awarded at ksh.200, 000 taking into account similar cases of **Nihon Complex limited & Thomas Njoroge Kirima versus Joseph Kiplagat Towett [2019] eKLR; Kenya Power & Lighting Co. Ltd versus Abdul Nyakundi Achuka [2018] eKLR.**

The respondent submitted that the appellant's case was that in the course of his employment with the respondent and while cooking kebabs he used a *karai i*nstead of a deep fryer and hot oil splashed on him and injured his arm and blamed the respondent. The defence was that the appellant was cooking kebabs using the *karai* as opposed to a deep fryer and that because he was cooking a lot of them he dipped them into the oil but he did not dip them in the proper manner. The respondent had provided him with gloves, tongs and long spoon but did not use them as tools provided for his work but opted to drop the kebabs into hot oil injuring his hands. The respondent administered first aid and later took him to hospital for treatment and paid the bills.

The respondent also submitted they discharged their duty of care by providing the appellant with the necessary work tools and thus not negligent. Section 13(1) (a) of the Occupational Safety and Health Act place the employee responsible to ensure their own safety while at work. In **Amalgamated Saw Mills versus David K Kariuki [2016] eKLR** the court held that an employer cannot babysit the employee to do manual tasks where there is no need for special training or supervision. The appellant was employed as a casual employee to undertake casual duties.

The trial court analysed the matter properly, applied the law and arrived at a well-reasoned judgement and which should be confirmed and the appeal dismissed.

This being a first appeal, the court has the duty to re-evaluate the evidence and find out whether the findings by the trial court were based on the evidence adduced or took into account irrelevant matters or omitted to consider relevant matters of law and make own findings and conclusions.

It is common cause that the appellant was an employee of the respondent with duties to cook kebabs and where on 2nd February, 2015 he got injured when he dipped kebabs into hot oil in a *karai.* It is not in contest that the appellant was injured while on duty. The respondent as the employer caused first aid to be administered and also took him to hospital where he was treated and paid the hospital bills.

Whereas under the provisions of the Occupational Safety and Health Act, 2007 the law requires for the safety, health and welfare of workers and all persons lawfully present at workplaces where there is injury to an employee while at the shop floor or work, the applicable statute in address such work injury is the Work Injury Benefits Act, 2007 and which allow ***for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.***

Whereas through the Chief Justice through Practice Directions gazetted on 5th August, 2011 vide Legal Notice No. 9243 allowed Magistrates' court to hear criminal matters arising out of out of Occupational Safety and Health Act, 2007 offences, work injuries remained regulated under the Work Injury Benefits Act, 2007. See **Rwanken Investment Limited & another versus The Minister for Labour & 2 others [2013] eKLR.**

The appellant's work accident having occurred on 2nd February, 2015 and seeking for compensation thereof by way of general and special damages, such matter ought to have been addressed under the provisions of Work Injury Benefits Act, 2007.

The application of the Work Injury Benefits Act, 2007 is important as under it, upon a report of a work injury, the Director has the mandate to attend at the shop floor and conduct an inquiry as to the circumstances leading to injury and the injuries occasioned to an employee. With the omission of this crucial step the court is only left with the pleadings, the evidence and judgement of the trial court noting it heard the witnesses and who must have made an impression with regard to facts set out above.

Taking into account the decision in **Supreme Court Petition No.4 of 2019 Law Society of Kenya versus Attorney General & COTU,** mindful that the judgement of the trial court was delivered on 27th January, 2017 seized of the appeal, the court shall address.

On 7th October, 2016 the appellant testified that he was injured while at work while cooking kebabs using *karai* instead of a deep fryer. That;

> **…** *there are deep frying machines but I was told not to use them because they used a lot of electricity. I complained severally but I was told to continue using the karai. I was burnt by oil I was taken to hospital … I was not trained as a chef. I was employed as a cleaner. …*

In defence, the respondent called Julius Njuguna Njenga working with the respondent as a hotelier and who testified that the appellant;

> **…** *he was a general cleaner. He was promoted to assistant cook after training. He was preparing kebabs. Hot oil splashed on his right arm. That had not happened before. The method he used to dip the kebabs was not proper. He never complained about using a*

karai and not a deep fryer. We use karai because the kebabs are voluminous. We provided gloves, tongs and long spoons but he did not use them. instead he dropped the kebabs. I am trained as a first aider and I gave him first aid. …

The general rule that an employer is liable for an employee inured while at work is with exception and one such was set out by the Court of Appeal in the case of **Makala Mailu Mumende versus Nyali Golf County Club [1991] KLR 13** that;

No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees

The duty placed upon the employer is that of taking reasonable care for the safety of its employees in all the circumstances so as not to expose them to an unnecessary risk. And the Court of Appeal in **Kiema Muthuku vs. Kenya Cargo Handling Services [1991] KLR 464; [1988-92] 2 KAR 258; [1990-1994] EA** also held that;

If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty.

In this case, the appellant did not contest that he was issued with gloves, thongs and a long spoon to undertaken his duties but he opted to use the *karai* and dropped kebabs on hot oil instead of dipping the same. There was training in this regard..

Where the employee thus exposes self to danger deliberately, well aware that such exposure is likely to cause accident, injury and loss, he cannot then turn around and accuse the employer of negligence or breach of a statutory duty and the employment contract.

In the instant case, where the appellant was promoted from the position of general cleaner to an assistant cook and was under the supervisor of the hotelier and above such he was provided with protective gear which if used would have reasonably reduced the occurrence of an accident in the nature that he was, he cannot fail to keep his safety and precaution(s) and then allege the respondent was liable. The respondent ensured reasonable measures were in place within the shop floor.

For these reasons and on the findings of the trial magistrate, the conclusions arrived at are proper and this court finds no matter to review, set aside or vary the same. The judgement is **Nakuru CMCC No.558 of 2015** is hereby confirmed.

Accordingly, the appeal herein is found without merit and is hereby dismissed.

Costs to the respondent.

Dated and delivered electronically this 9th April, 2020 at 0900 hours.

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15th March, 2020 and both parties having given consent, the Judgement herein is delivered via e – mail;

Morara Apiemi & Nyangito Advocates for the appellant through omuseej@gmail.com and phimora@yahoo.com

And

Murimi, Ndumia, Mbago & Muchela Advocates for the respondent through nkr@mmmnlaw.org and kiongopaulmurimi@gmail.com

Issued electronically this 9th April, 2020.

M. MBARU

JUDGE